

October 9, 2014

Horst Greczmiel
Council on Environmental Quality
722 Jackson Place NW
Washington, DC 20503

RE: Draft Guidance on Effective Use of Programmatic National Environmental Policy Act Reviews

Dear Mr. Greczmiel:

Ocean Conservancy¹ appreciates this opportunity to comment on the Council on Environmental Quality's (CEQ) Draft Guidance on Effective Use of Programmatic Reviews under the National Environmental Policy Act (NEPA).² Guidance for a consistent approach to programmatic NEPA review across all federal agencies will improve federal decision-making by facilitating collaboration and coordination within and among agencies, improving public transparency and involvement, and facilitating efficiencies in time and cost. We thank CEQ for its work on this much-needed guidance.

Ocean Conservancy provides the following comments and recommendations for the draft guidance:

1. CEQ should provide additional guidance on the foundational question of when agencies should employ a programmatic approach.
2. CEQ should provide more detail on how cumulative impacts should be considered in the context of programmatic reviews.
3. The guidance must include additional parameters to prevent the "shell game" effect, where the tiered programmatic process is used to avoid preparing detailed analyses.
4. CEQ should adopt the recommendation of the 2003 NEPA Task Force regarding monitoring, mitigation and adaptive management.
5. CEQ should clarify that tiering should *not* rely on additional—and often inaccessible—documentation above and beyond the traditional NEPA documents.

These comments and recommendations are discussed in detail below.

¹ Ocean Conservancy is a nonprofit organization that educates and empowers citizens to take action on behalf of the ocean. From the Arctic to the Gulf of Mexico to the halls of Congress, Ocean Conservancy brings people together to find solutions for our water planet. Informed by science, our work guides policy and engages people in protecting the ocean and its wildlife for future generations.

² 79 Fed. Reg. 50578 (August 25, 2014).

1. Provide additional guidance on when a programmatic approach is required.

The draft guidance includes a short section titled “When to Use a Programmatic and Tiered NEPA Review.”³ We thank CEQ for acknowledging this threshold question, but we urge CEQ to expand this section to ensure adequate understanding of these concepts among agencies that deal with varying issues and situations. While some jurisprudence on this question exists, agencies could benefit from a better explanation of the tests used to determine when a programmatic review is necessary and examples that show proper application of those tests in a range of situations.

In 1976, the U.S. Supreme Court noted that NEPA “may require a comprehensive impact statement”—i.e., a programmatic environmental impact statement (PEIS)—“in certain situations where several proposed actions are pending at the same time.”⁴ The court further elaborated that “[b]y requiring an impact statement Congress intended to assure such consideration during the development of a proposal or [...] during the formulation of a position on a proposal submitted by private parties. A comprehensive impact statement may be necessary in some cases for an agency to meet this duty.”⁵ In determining whether a PEIS is necessary, the Court considers “the extent of the interrelationship among proposed actions and practical considerations of feasibility.”⁶ CEQ regulations provide that an agency should prepare a PEIS if actions are “connected,” “cumulative,” or “similar,” such that their environmental effects are best considered in a single impact statement.⁷ Actions are connected if they (i) automatically trigger other actions which may require environmental impact statements (EISs), (ii) cannot or will not proceed unless other actions are taken previously or simultaneously or (iii) are interdependent parts of a larger action and depend on the larger action for their justification.⁸ A 1981 CEQ “Frequently Asked Questions” document explains that a programmatic approach is needed “when similar actions, viewed with other reasonably foreseeable or proposed agency actions, share common timing or geography.”⁹

Despite these long-standing tests, many federal agencies still resist the programmatic approach or are unclear when a programmatic approach is required. The draft guidance summarizes general categories of actions where a programmatic approach should be considered, but fails to fully explain each test or give examples that show proper application of the tests in different scenarios.

Currently, as a developing example, federal agencies are inconsistently applying the programmatic approach as they address restoration in the Gulf of Mexico region after the BP Deepwater Horizon oil disaster. The BP oil disaster has provided an unprecedented opportunity for restoration in

³ *Id.* at 50581-82.

⁴ *Kleppe v. Sierra Club*, 427 U.S. 390 (1976) (citing 42 U.S.C. § 4332(2)(C)).

⁵ *Id.*

⁶ *Id.* at 412.

⁷ 40 CFR. § 1508.25(a); see also *Kleppe v. Sierra Club*, 427 U.S. 390, 409-10 (1976); *Nevada v. Dep’t of Energy*, 457 F.3d 78, 92 (D.C.Cir.2006).

⁸ 40 C.F.R. § 1508.25(a)(1).

⁹ Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026, 18,033 (Mar. 23, 1981).

the Gulf region. Several connected programs will guide restoration, including the Deepwater Horizon Natural Resource Damage Assessment (NRDA),¹⁰ the Early Restoration Framework Agreement between BP and NRDA Trustees,¹¹ and several separate but related funding streams created by the RESTORE Act of 2012.¹² Each of these programs will involve numerous individual projects with significant environmental impacts and common timing and geography, many of which will trigger EISs in their own right. These programs will have cumulative effects across the region and each contain interdependent parts that make up a related whole. While the administrators of some of these programs have embraced the programmatic approach, others have failed to even acknowledge NEPA obligations.

The NRDA Trustees are developing a PEIS for the NRDA restoration program,¹³ and after insistence from the nonprofit community, the NRDA Trustees acknowledge the need to prepare a PEIS for the NRDA Early Restoration Plan as well.¹⁴ The RESTORE Act's restoration effort is similar in purpose, scope and impact, though its mandate is much broader, allowing for activities with an economic focus in addition to ecological restoration. The RESTORE Act allocates 80 percent of the administrative and civil penalties paid under the Clean Water Act in connection with the BP oil disaster to the Gulf Coast Restoration Trust Fund to restore the Gulf of Mexico. Under the Act, the Department of the Treasury will administer grants to Gulf states and local governments for some components, and the Gulf Coast Ecosystem Restoration Council (Council)—a new federal body created by the Act¹⁵—will administer grants for other specific components.¹⁶

The Council is directed by the Act to prepare a Comprehensive Plan which will govern its allocation of funding to projects and programs. The Council acknowledged its NEPA responsibilities in its Initial Comprehensive Plan, stating “the Council is required to consider all reasonably foreseeable alternatives and the environmental effects of its proposed actions and to inform and involve the public in its environmental analysis and decision-making process.”¹⁷ The Council prepared a Programmatic

¹⁰ See <http://www.gulfspillrestoration.noaa.gov/>.

¹¹ Framework for Early Restoration Addressing Injuries Resulting from the Deepwater Horizon Oil Spill (April 20, 2011), available at, <http://www.gulfspillrestoration.noaa.gov/wp-content/uploads/2011/05/framework-for-early-restoration-04212011.pdf> (visited Sept. 24, 2014).

¹² Resources and Ecosystems Sustainability, Tourist Opportunities, and Revived Economies of the Gulf Coast States Act of 2012 (RESTORE Act), Public Law No. 112-141, Subtitle F (Apr. 18, 2012).

¹³ NOAA, Gulf Spill Restoration Planning, Notice of Intent To Begin Restoration Scoping and Prepare a Programmatic Environmental Impact Statement, 76 Fed. Reg. 9327 (Feb. 17, 2011).

¹⁴ Department of the Interior, Deepwater Horizon Oil Spill, Final Programmatic and Phase III Early Restoration Plan and Final Early Restoration Programmatic Environmental Impact Statement, Notice of Availability, 79 Fed. Reg. 36328 (June 26, 2014).

¹⁵ 33 U.S.C. § 1321(t)(2)(C) (“There is established as an independent entity in the Federal Government a council....” which consists of eleven federal and state officials identified in the RESTORE Act.)

¹⁶ 33 U.S.C. § 1321(t).

¹⁷ Gulf Coast Ecosystem Restoration Council, Restoring the Gulf Coast's Ecosystem and Economy (Initial Comprehensive Plan, Aug. 2013) at 3.

Environmental Assessment (PEA) and made a finding of no significant impact (FONSI) for the Initial Comprehensive Plan.¹⁸

Unlike the other federal action agencies involved in Gulf restoration, the Department of the Treasury is not acknowledging its NEPA obligations, nor is it taking a programmatic approach. Treasury disburses funds for programs and projects under the “Direct Component” of the Act directly to states and coastal counties/parishes (nonfederal entities) in the form of grants.¹⁹ These applicant-entities must prepare and submit “multi-year implementation plans” to Treasury, which reviews the application to determine whether the applicant has fulfilled statutory and regulatory mandates limiting expenditures to certain eligible activities and requiring audits, public involvement and use of best available science.²⁰ Treasury then authorizes the release of funds from the Gulf Coast Restoration Trust Fund to the states or counties/parishes to implement the plans and projects. If the grant recipients fail to follow the plans, or if Treasury subsequently determines that the plans do not meet the requirements of the Act or regulations, Treasury may require the applicant-entities to pay back the money.²¹ In its Interim Final Rule for administration of these grants,²² Treasury has failed to acknowledge the need to conduct NEPA review for the multi-year implementation plans and activities. Treasury’s tentative conclusion²³ that NEPA will not apply to its activities is based on its “view” of “its statutory role,” which it determines “to be administrative and ministerial duties that do not require an environmental analysis under NEPA.”²⁴ This determination conflicts with other actions carried out with federal funding and under substantial federal control, which are subject to NEPA jurisdiction.²⁵

This inconsistency in when and how a programmatic review is conducted undermines the Gulf restoration effort and fails to acknowledge the interconnectedness of the Gulf’s ecosystem and the

¹⁸ *Id.* See also, Finding of No Significant Impact (Aug. 21, 2013), available at <https://edit.restorethegulf.gov/sites/default/files/Signed%20FONSI.pdf>.

¹⁹ 33 U.S.C. § 1321(t)(1).

²⁰ See Notice of Proposed Rulemaking, Gulf Coast Restoration Trust Fund, 78 Fed. Reg. 54801 (Sept. 6, 2013).

²¹ 33 U.S.C. § 1321(t)(1)(E), (G) & (H).

²² Department of the Treasury, Regulations for the Gulf Coast Restoration Trust Fund, Interim Final Rule, 79 Fed. Reg. 48039 (Aug. 15, 2014).

²³ Treasury has published a draft directive and accompanying guidelines containing policy and procedures for implementing the National Environmental Policy Act and is accepting comments through October 21, 2014. 79 Fed. Reg. 49834 (August 22, 2014).

²⁴ Interim Final Rule, *supra* note 22.

²⁵ A key question in NEPA jurisdiction is whether or not federal involvement has “federalized” an otherwise purely state or private project. *Almond Hill Sch. v. United States Dep’t of Agric.*, 768 F.2d 1030, 1039 (9th Cir. 1985). To make this determination, courts look “to the nature of the federal funds used and the extent of federal involvement.” *Sierra Club v. Penfold*, 857 F.2d 1307, 1314 (9th Cir. 1988). Most courts eventually focus on two factors: (1) the amount and nature of federal funding, and (2) the extent of the federal actor’s involvement and control. *Sancho v. U.S. Dept. of Energy*, 578 F.Supp.2d 1258, 1266 (D.Hawai’i 2008) (citing *Rattlesnake Coal. v. EPA*, 509 F.3d 1095, 1101 (9th Cir. 2007); *Ka Makani ‘O Kohala Ohana Inc. v. Dept. of Water Supply*, 295 F.3d 955, 960 (9th Cir. 2002); *Sierra Club v. Penfold*, 857 F.2d 1307, 1314 (9th Cir. 1988); *Almond Hill School v. United States Department of Agriculture*, 768 F.2d 1030, 1039 (9th Cir. 1985); *State of Alaska v. Andrus*, 591 F.2d 537, 541 (9th Cir. 1979)). Significant federal funding can turn what would otherwise be a state or local project into a major federal action. *Ka Makani ‘O Kohala Ohana Inc. v. Dep’t of Water Supply*, 295 F.3d 955, 960 (9th Cir. 2002).

likelihood of cumulative impacts from restoration activities. We urge CEQ to include additional guidance on when a programmatic approach should be taken. This might include further explanation of the tests or an explanation of examples.

2. Include stronger recommendations for agency evaluation of cumulative impacts.

Impact assessments in programmatic NEPA documents must consider environmental effects of all reasonably foreseeable cumulative actions in large geographic areas and over a long period of time.²⁶ Importantly, the cumulative impacts analysis must cover all actions, “regardless of what agency (Federal or non-Federal) or person undertakes such other actions.”²⁷ Many programmatic reviews are expansive in geographical and temporal scope. As the scope expands, cumulative effects become more complex, solutions to problems affect multiple agencies and information sharing becomes essential. Because federal agencies, state and local governments, and private parties frequently plan or implement activities in the same geographic area, stronger communication and coordination must occur to ensure cross jurisdictional actions do not conflict or interact in ways that increase the likelihood of significant impacts to the environment.

When evaluating environmental effects at the programmatic level, agencies should consider the cumulative impacts for each resource analyzed in the programmatic review rather than only completing cumulative analysis for the program overall. Without a greater understanding of the environmental impacts of multiple activities on the resources in the program area, it is difficult to plan individual projects in a way that would adequately avoid or mitigate those impacts. This comprehensive approach to analyzing environmental impacts is challenging but critical to programmatic planning. However, contrary to CEQ’s regulations, agencies often fail to include in the discussion the missing or incomplete information needed to complete such an analysis.²⁸ In doing so, agencies leave the public with inadequate information and impede the ability to fully analyze the impacts of the program.

The challenge of undertaking a rigorous cumulative impact analysis is compounded by the lack of a standardized approach and methodology. CEQ’s regulations,²⁹ its 1997 handbook³⁰ and its 2005 memorandum³¹ establish the basic parameters of cumulative impact analysis under NEPA. Still, these sources of guidance—and judicial interpretations of them—do not establish a clear roadmap for federal agencies to follow. For example, within the Department of the Interior some bureaus have developed additional guidance on cumulative impact analysis, while others have not.³² “No universally accepted

²⁶ 40 C.F.R. § 1508.7.

²⁷ *Id.*

²⁸ 40 C.F.R. § 1502.22.

²⁹ See 40 C.F.R. Parts 1500–1508.

³⁰ Council on Environmental Quality, Considering cumulative effects under the National Environmental Policy Act (1997), available at <http://ceq.hss.doe.gov/nepa/ccenepa/exec.pdf>

³¹ Memorandum from James L. Connaughton to Heads of Federal Agencies re: Guidance on the consideration of past actions in cumulative effects analysis (June 24, 2005).

³² The Bureau of Land Management’s (BLM) NEPA handbook includes BLM-specific information on cumulative impact analysis, while the Bureau of Ocean Energy Management appears to have no similar guidance.

framework or approach for cumulative effects analysis exists,”³³ and federal agencies have not developed or implemented a consistent methodology. One result is that decision-makers, resource managers, industry and the public are given information that varies widely in quality and, hence, usefulness, from the standpoint of planning for and evaluating management decisions, such as permit applications, lease sales and resource-use plans.

The draft guidance misses an opportunity to provide clear recommendations for agencies on the best way to coordinate and share information about ongoing or proposed activities. The genre of cumulative impacts analysis has received a great amount of focus from academia and private thinkers in recent years.³⁴ In the marine environment, a leading example is work done at the National Center for Ecological Analysis and Synthesis at the University of California, Santa Barbara, where analysts followed rigorous procedures to map out existing data and threats and identify areas that may be affected and considered for special management or mitigation (e.g., time/area closures, areas to be avoided, additional observation or restrictions on activities).³⁵ CEQ’s guidance should include the use of best practices for cumulative impacts review.

Further, agencies should be encouraged to use new and innovative technologies for analysis and information sharing. Agencies should take advantage of the developments in technology, such as online clearinghouses with advanced search options, as well as mapping software, to enable timely access to environmental data related to agency actions.

3. Programmatic reviews must not be used to limit the amount of information provided to the public.

NEPA has played a primary role in increasing citizens’ opportunities to remain informed of and participate in the development of federal actions that may significantly affect the environment. One of NEPA’s goals is to improve decision-making by facilitating the availability of better information. Programmatic reviews should provide information efficiently, but must not be so limited as to provide insufficient information or overly limited analysis. As noted in the draft guidance, the 2003 NEPA Task Force found that reliance on programmatic NEPA documents often results in a “shell game” of when and

³³ Holland-Bartels, Leslie and Pierce, Brenda, eds., *An evaluation of the science needs to inform decisions on Outer Continental Shelf energy development in the Chukchi and Beaufort seas, Alaska: U.S. Geological Survey Circular 1370* at 213 (2011).

³⁴ For example, agencies need to establish an adequate environmental baseline to detect and interpret accumulated changes over time and to characterize the resources’ responses to change and ability to withstand stresses. See, e.g., U.S. Geological Survey, *An Evaluation of the Science Needs to Inform Decisions on Outer Continental Shelf Energy Development in the Chukchi and Beaufort Seas, Alaska* (2011). Agencies should also look into the utility of decision-support tools, such as the Cumulative Impacts Assessment Tool and MarineMap. See, e.g., McClintock, W., et al. (2010). *MarineMap: Web-Based Technology for Coastal and Marine Spatial Planning*, American Geophysical Union (Fall 2010).

³⁵ See, e.g., Halpern, B.S., W. Walbridge, K.A. Selkoe, C.V. Kappel, and F. Micheli. 2008. A global map of human impact on marine ecosystems. *Science* 319:948-952; Halpern, B.S., C.V. Kappel, K.A. Selkoe, F. Micheli, et al. 2009. Mapping cumulative impacts to California current marine ecosystems. *Conservation Letters* 2(3):138-148.

where issues will be addressed.³⁶ The “shell game” effect refers to situations where the programmatic system is used to obscure the relationships between the programmatic issues being analyzed and the specific issues being deferred—whether intentionally or unintentionally. It is sometimes unclear when or how deferred issues will be addressed. For example, the Bureau of Ocean Energy Management (BOEM, formerly the Minerals Management Service) has used the Outer Continental Shelf Lands Act’s (OCSLA) segmented structure to avoid preparing detailed NEPA analyses at later stages in the process.

Under OCSLA, oil and gas planning and activities occur in four main stages: (1) development of a five-year leasing program, (2) planning and execution of lease sales, (3) exploration of leases and (4) development and production.³⁷ In theory, this segmented process could allow for adequate NEPA review, with NEPA documents providing detailed and site-specific analyses as activity proceeds from a nationwide five-year program to a site-specific exploration well or development and production plan.³⁸ In practice, however, BOEM has used OCSLA’s segmented process to avoid preparing detailed analyses.

The Court of Appeals for the District of Columbia has observed that OCSLA is “pyramidal in structure, proceeding from broad-based planning to an increasingly narrower focus as actual development grows more imminent.”³⁹ With respect to NEPA compliance, the court observed that BOEM “may issue a broader EIS at the earlier ‘need and site selection’ stage of a program, and issue subsequent, more detailed environmental impact statements at the program’s later, more site-specific stage.”⁴⁰ Unfortunately, however, BOEM does not issue “more detailed environmental impact statements” at later stages, such as approval of exploration plans. Instead, in the Gulf of Mexico, the agency has avoided any additional meaningful analysis by improperly using a categorical exclusion process.⁴¹ And in the Arctic, the agency has prepared less-detailed environmental assessments (EA). In other words, at the five-year plan and lease sale phases, BOEM’s generalized NEPA documents gloss over important issues and potential environmental impacts. Instead of filling in those gaps with detailed, site-specific information, later NEPA analyses—if any—largely recapitulate the information contained in previous documents.

The analytical shell game results in a failure to analyze important effects on the human environment and missed opportunities to develop alternatives to the proposed actions. These failures and missed opportunities undercut NEPA’s primary function: to provide decision-makers and the public with a concise, meaningful analysis of the potential environmental impacts of federal actions. Agencies cannot vaguely describe issues in a PEIS and then fail to address them adequately in the tiered

³⁶ 79 Fed. Reg. at 50580 (citing Council on Environmental Quality, National Environmental Policy Act Task Force Report: Modernizing NEPA Implementation (Sept. 24, 2003)).

³⁷ Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1331 et seq.

³⁸ See Council on Environmental Quality, *Report Regarding the Minerals Management Service’s National Environmental Policy Act Policies, Practices, and Procedures as They Relate to Outer Continental Shelf Oil and Gas Exploration and Development* (hereinafter “CEQ MMS NEPA Report”) (August 16, 2010).

³⁹ *California v. Watt*, 668 F.2d 1290, 1297 (D.C. Cir. 1981).

⁴⁰ *Ctr. for Biological Diversity v. Dep’t of the Interior*, 563 F.3d 466, 474 (D.C. Cir. 2009) (citing 40 C.F.R. § 1508.28).

⁴¹ CEQ MMS NEPA Report, *supra* note 43, at 24-25.

document, and inadequacies in the tiered document cannot be cured by cross reference to the PEIS or other documents.⁴² The CEQ guidance should go further to prevent the shell game problem.

Programmatic documents by design often must include information from other agencies and permitting processes relevant to the proposed activities. As such, CEQ regulations correctly allow agencies to incorporate information by reference. Often that information is not properly referenced or easily accessible to the public. When an agency incorporates materials by reference in a PEIS, it must make materials readily available so that the public can see what the agency relied on in making its decision.⁴³ Section C, Preparing the Documents,⁴⁴ should be amended to specify that all materials, research and findings referenced in the PEIS must all be available online in the same location as the NEPA document.

4. Adopt Task Force recommendations for mitigation, monitoring, and adaptive management.

We applaud CEQ for acknowledging the critical importance of monitoring the impact of programs rather than only focusing on the project-specific outcomes.⁴⁵ However, we are concerned about the failure of programmatic reviews to include adequate plans and practices for programmatic monitoring and adaptive management. We encourage CEQ to assist agencies in developing best management practices that ensure comprehensive mitigation, monitoring and management that focuses on sustainability rather than triage and produces effective adaptive management strategies. CEQ should adopt several recommendations of the NEPA Task Force⁴⁶ that will assist agencies in determining how to address mitigation, monitoring and adaptive management:

- Integrate the NEPA process into environmental management systems as a way to further the environmental sustainability and enhancement policies contained in Section 101 of NEPA.⁴⁷
- Use adaptive management to address unintended impacts of a program that might occur over time.
- Update the traditional “predict, mitigate, implement” model to “predict, mitigate, implement, monitor and adapt” for those actions where adaptive management would be an appropriate model for the NEPA process.⁴⁸
- Use adaptive management in designing mitigation, monitoring and enforcement programs.

⁴² See Beth C. Bryant, *NEPA Compliance in Fisheries Management: The Programmatic Supplemental Environmental Impact Statement on Alaskan Groundfish Fisheries and Implications for NEPA Reform*, 30 Harv. Envtl. L. Rev. 441, 450 (2006).

⁴³ See e.g., President Barack Obama, Memorandum for the Heads of Executive Departments and Agencies, Freedom of Information Act (January 21, 2009); Office of Management and Budget, Open Government Directive, M10-06 (December 8, 2009); Department of Commerce Open Government Plan 2.0 (March 2012).

⁴⁴ *Id.* at 50585.

⁴⁵ *Id.* at 50586.

⁴⁶ Council on Environmental Quality, National Environmental Policy Act Task Force Report: Modernizing NEPA Implementation (Sept. 24, 2003).

⁴⁷ *Id.* at 41, section 3.5.

⁴⁸ *Id.* at 45, section 4.1.

- Integrate adaptive management into EAs, especially when a mitigated finding of no significant impact (FONSI) is required to prevent potential impacts from being significant.⁴⁹

5. Tiering should *not* rely on additional—and often inaccessible—documentation above and beyond the traditional NEPA documents.

We support the concepts of tiering and incorporation by reference where appropriate. Tiering avoids duplication by allowing agencies to create an overarching NEPA document, and then tier off of that document for more specific analysis of subsequent sub-actions. In fact, federal agencies have been consistently and effectively using tiering for over three decades.⁵⁰ Tiering is an important tool that creates efficiencies leading to time and cost savings. However, as of late, at least one agency has suggested adding several additional types of documentation in the tiering process.

The National Marine Fisheries Service (NMFS) is proposing a new documentation system which would unnecessarily complicate CEQ's workable tiering system. NMFS intends to use these documents to deny supplementation and development of new environmental assessments (EAs) or EISs when relying on existing NEPA analysis for new or different management decisions. In a 2008, NMFS proposed new documents that it called "Framework Implementation Procedure," (FIP), "Memorandum of Framework Compliance" and "Framework Compliance Evaluation."⁵¹ In an updated 2014 draft policy directive currently under review, NMFS referred to these documents as "NEPA Advanced Planning Procedure," (NAPP), "NEPA Compliance Evaluation," (NCE), and "Memorandum of NEPA Compliance." (MNC). Further, the draft policy directive encourages the use of "Supplemental Information Reports." (SIR).⁵² Regardless of the name changes, reliance on these documents and procedures would be problematic. As explained below, these documents would allow NMFS to undermine the NEPA tiering process and rubber stamp management decisions without considering the impacts of the action and the transparency required by NEPA.

We have significant concerns about the use of these documents and procedures. First, these unnecessary documents are not subject to the same requirements for public notice, accessibility and participation under the NEPA process as exists under current practice and law. Allowing federal agencies to create unofficial procedures with no clear requirements for scoping, notice and comment, and publication opens the door to significant failures to comply with NEPA requirements. Second, there is no specified amount of time after which these new documents are no longer allowed to be used. As currently proposed, it is unclear whether these documents could be repeatedly used year after year

⁴⁹ *Id.* at 48.

⁵⁰ 40 C.F.R. § 1508.28, 43 Fed. Reg. 56,003 (Nov. 29, 1978); Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026, Question 24c (Mar. 23, 1981).

⁵¹ 73 Fed. Reg. 27998, 28005, 28012-13.

⁵² National Oceanic and Atmospheric Administration (NOAA), National Environmental Policy Act compliance for council-initiated fishery management actions under the Magnuson-Stevens Act (June 2014 NMFS Draft Policy Directive), at 13-15, 79 Fed. Reg. 36726 (June 30, 2014). *See also*, Comment letter from Marine Fish Conservation Network on the 2008 draft NEPA-MSA Rule, at 13-15 (August 11, 2008).

without notice or comment and without further analysis as to adequacy. This may undermine the letter and spirit of NEPA and the CEQ tiering system. These new documents cannot replace EAs or supplementation. Rather than creating efficiencies, these new processes and documents will create additional paperwork burdens and bureaucracy that will lead to confusion and costly litigation.

As such, we oppose the use of the alternative methodologies for tiering. We recommend that CEQ clarify that additional documentation is not needed to facilitate tiering. If a memorandum is included in the record to note that supplementation is not required in a given situation, we urge CEQ to require that this memorandum not only be “included in the administrated record” as noted in the draft programmatic guidance,⁵³ but also that this memorandum be subject to public notice and comment so that the public may be fully aware of the agency’s decision not to supplement the NEPA document.

In conclusion, we thank CEQ for drafting guidance for programmatic reviews and we look forward to the final guidance. We understand the challenges agencies face while crafting NEPA documents and the tension that often exists between a desire to move activities forward while ensuring that agencies take the “hard look” at environmental impacts required by NEPA. CEQ’s efforts to assist agencies with robust guidance on programmatic review should relieve some of those tensions, and the comments we have provided will ensure the integrity of such review.

Sincerely,

Ivy Fredrickson
Staff Attorney, Conservation Programs
Ocean Conservancy
503-505-6575, ifredrickson@oceanconservancy.org

⁵³ 79 Fed. Reg. at 50588.